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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND
RULE 28, RULES OF THE SUPREME
COURT OF ARIZONA

Supreme Court No. R-13-_____

Pursuant to Rule 28, Rules of the Supreme Court, Mike Palmer, a member of the public deeply concerned about justice,¹ petitions this Court to adopt the proposed amendment to Rule 28(A)(1) of the Rules of the Supreme Court of Arizona to prohibit the State Bar proper from petitioning the Court to adopt, amend, or repeal a court rule, as proposed in the Attachment.

Consistent with this, I likewise petition this Court to prohibit the State Bar proper from commenting on any petition in the Court's public forum.

But nothing in this proposed change prohibits individual officers of the State Bar from petitioning or commenting to the Court. However, they cannot represent

¹ Per Amos 5:15 in the Bible: "Hate evil, love good. Maintain justice in the courts."

that they have the weight of that body behind their petition or comment. Their petition or comment must stand or fall on its individual merits.

If this petition is adopted, the reference to the State Bar Executive Director in Rule 28(C) will need to be deleted, as will parts of the COMMENT to Rule 28, as also proposed in the Attachment.

I. Background and Purpose of the Proposed Rule Amendment

The State Bar of Arizona was created as an appendage of the Court pursuant to Arizona Supreme Court Rule 32(a).

Consistent with this, both Arizona state and federal courts recognize that “[t]he State Bar of Arizona is an arm of the Arizona Supreme Court.” *Drummond v. Stahl*, 127 Ariz. 122, 126 (1980) 618 P.2d 616; and *Howell v. Arizona Storage Inns*² respectively. As such, being a part of government, it is subject to citizen oversight. As here.

It has been my observation in my short time in the public forum that the State Bar of Arizona occasionally takes up controversial, arguably political causes that have nothing to do with benign black-letter procedural law.

² Not sure how to cite. 10–CV–00790–JWS in the Arizona District Court, Order, Doc. 33

When the State Bar proper petitions (or comments to) the Supreme Court in this forum, the arm appears to be stimulating the body.

Regardless if anything comes of it, it appears unseemly on its face and must be stopped.

Moreover, according to paragraph [12] of the Court's Preamble to the Rules of Professional Conduct, speaking about self-government (of the Bar), “The [legal] profession has a responsibility to assure that its regulations are conceived in the public interest and NOT in furtherance of **parochial or self-interested concerns of the bar.**” (emphasis mine.)

But as it stands now, there can be (and has been) the appearance that the Bar promotes its own public policy (self-interest) instead of the public interest, especially when the Bar champions matters involving controversial rule changes that are more about political agendas and Thought Crimes as opposed to routine benign black letter procedural matters of law.

Since self-government, as in the movie industry with its questionable P, PG and R industry ratings, is always suspect when there's self-interest, the only absolute way to guarantee there is no appearance of self-promotion by the Bar—that the Bar is above reproach—is to prohibit the Bar proper from speaking in the

forum. (There are no true Checks & Balances, in a division of power sense, to reign in the Bar. Also, the leadership of the Bar enjoy absolute immunity from suit. No redress there.)

Next is the tension caused by the Bar being much like an oppressive labor union which attorneys have to join, whether they want to or not. And the forced representation before the Court that comes with it. (Forced in the sense that not all members may approve of a particular petition or comment the Bar files, but have no choice but be a part in it.)

While I appreciate the Keller-pure stance the Bar has adopted when it comes to political campaigns, lobbying, etc. and while I appreciate that the Bar has a representative form of government within its own body as a sort of safe-guard³, the fundamental question is: Can the Bar ethically represent its members in the forum?

Unless there is a 100% unanimous agreement of the members on any issue the Bar presents to the Court in the forum, I say “No.” I submit the Bar must take a Keller-even-purer stance.

If the Bar were a voluntary organization, which attorneys could join—and quit—at will, it could do what it wanted without this citizen's concern. But I am

³ But then, Jimmie Hoffa was elected too.

concerned because members of the Bar are forced to participate in speech they may not want, with no real redress.

It seems to me this is a violation of the members' First Amendment right, per *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)⁴, since 1) the Bar is an arm of the government and 2) that governmental “agency” might be essentially forcing its silent members to say something they don't want to say. Unlike Keller, this is irreparable harm, since no amount of refunded monies can undo what the Bar is doing as it speaks in the forum.

Further, when the Bar represents a position in the public forum that is simultaneously championed and opposed by its individual members, there appears to be a de facto conflict of interest. That is, if the individual members of the Bar are thought of as “current clients,” who are paying counsel who represents them in the forum (even though they may not want counsel, it's an offer they can't refuse), then “the representation of one client is directly adverse to another client.” This would be an ethics violation, per ER 1.7(a)(1).

⁴ “[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.” (quotations omitted.)

Since the clients are a disparate bunch, but are forced to use the same counsel to represent them, there is no way to resolve this conflict except to prohibit the Bar proper from representing its diverse clients in the public forum.

Next, please refer to the second paragraph in the Comment to Rule 28. There, discussing the adoption of Rule 28, the Comment says in part, “The practice of state bar committees developing and submitting suggested changes in the rules to the Board of the Governors of the Bar should continue.”⁵

No, it shouldn't. When the “Bar” pitches a controversial change to the Court, “there is a significant risk that the representation of one or more clients [the individual members of the Bar] will be materially limited by . . . a personal interest of the lawyer [the Bar's Governors].” That would be a violation of ER 1.7(a)(2).

In sum, 1) To prevent the appearance of impropriety by the Bar (and therefore the Court, since the Bar is an arm of the Court); and 2) To promote public confidence in the Judiciary (again, because the Bar is a part of the Court, the Judicial Code applies to the Bar); and 3) Since “justice should not only be done, but should manifestly and undoubtedly be seen to be done”⁶ (because the Bar is

⁵ I'd be curious to know if the Bar helped write this. (See? There's the appearance of impropriety raising its ugly head.)

⁶ *Liteky v. United States*, 510 U.S. 540, 565, 114 S.Ct. 1147 (1994)

part of the judicial), the Bar proper must be prohibited from petitioning or commenting on proposed Rule changes in the public forum. It's the only way to manifestly prevent conflicts of interest and ethical violations by the Bar.

No one will be harmed by adopting this petition. If the Court wants to make a rule change, the Court can still file its own petitions, as it frequently does. The individual Governors or Committee Chairmen of the Bar can meet in their meetings and then individually petition or comment on proposed Rule changes as individuals. But, per the Code of Judicial Conduct, they cannot use the prestige of the Bar/Court to promote occasional politicking. Nor can they represent, by filing as the Bar, that the body of their membership is behind them. For it may not be. Such a representation could be misrepresentation to the Court, a violation of ER 4.1 and 8.3 at a minimum.

Adopting this petition is the most equitable solution for all concerned, from the high Court down to the lowly public. It also has the additional benefit of allowing all Bar members an equal voice, in contrast to the current monopolistic union “representation” forced on them by law as currently practiced in the forum.

II. Contents of the Proposed Rule Amendment

Please see Attachment.

SUBMITTED this 10th day of January, 2013

By /s/ Mike Palmer
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Attachment

Rule 28. Procedure for Adoption, Amendment or Repeal of Rules

(A) Petition for Adoption, Amendment, or Repeal of Rule; Deadline for Filing.

(1) Deadline for and Method of Filing. Any person, association or public agency except for the State Bar of Arizona interested in the adoption, amendment, or repeal of a court rule may file a petition to adopt, amend, or repeal a rule. Such petition shall be filed on or before January 10 in any given year in order to be considered and acted upon by the court at its annual rules conference the following September. (The exception for the State Bar of Arizona does not preclude individual members of the Bar from filing a petition. But they are prohibited from exercising their prestige of office in so doing or endorsing their personal petition as representative of the Bar.)

(C) Opening the Rule Change Petition for Comment. Any person, association or public agency except for the State Bar of Arizona may comment on an open petition. . . .

Copies of the petition and the request for comment shall be sent by the clerk, on or before January 20 of each year, by mail or electronically, or as otherwise directed by the court, to the following:

Governor, State of Arizona

Speaker, Arizona House of Representatives

President, Arizona State Senate

Attorney General of Arizona

Director of the Arizona Legislative Council

Dean, Arizona State University Law School

Dean, University of Arizona Law School

Administrative Director of the Courts

Clerk, Court of Appeals, Division One

Clerk, Court of Appeals, Division Two

Each Superior Court Presiding Judge

Each Chief Judge of the Court of Appeals

~~Executive Director of the State Bar~~

. . .

(E) Request for Public Hearing. At any time prior to the expiration of the time allowed for comment on a petition for rule change, the court, on its own motion or at the request of the petitioner or any interested person or organization except the State Bar of Arizona, may order that a public hearing be held on the proposed rule change.

COMMENT

Prior to the adoption of Rule 28 the process for making changes to court rules was not formalized. Suggestions for rule changes came from various groups, particularly the State Bar of Arizona. ~~In adopting Rule 28 the court did not intend to limit or discourage any group from continuing to make suggestions on this subject.~~ The purpose of Rule 28 is to formalize the procedure for receiving and considering proposals for rule changes.

~~It is not the intention of the court to change the process followed by the State Bar in developing proposed rule changes. The practice of state bar committees developing and submitting suggested changes in the rules to the Board of the Governors of the Bar should continue. Any proposals for rule changes approved by the Board of Governors will, however, be submitted to the court in the manner prescribed by Rule 28.~~